BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Limitations on Commercial Time on Television Broadcast Stations	)))	MM Docket No. 93-254

COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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Summary

INTV opposes the reimposition of commercial time restrictions on broadcast television. Restricting the amount of commercial time allowed on broadcasting channels would have devastating and lasting effects not only on broadcasters, but also on the millions of Americans who rely on this form of free speech each and every day.

The basic assumptions that were reached in the 1984 Order were correct. It is competition--not rules--that is the most efficient regulator of commercial time on broadcast channels. In 1984, the Commission correctly concluded that the media marketplace was so competitive that it could regulate itself. Now, nine years later,the market is far more competitive and the conclusion reached in 1984 is even more applicable. A broadcaster will tread no less carefully when subject to the economic penalties of the marketplace as when subject to discipline from the Commission.

Further, the public interest would not be served by reestablishing commercial limits. The Commission has a strong record of allowing the public to determine the definition of public interest. The format, content, and duration of commercials respond to the public interest. If a significant number of people find commercials useful and not offensive, false, or lengthy, then to establish limits would contravene the public interest.

Also, to impose commercial time limits would unfairly restrict one competitor as against others. Broadcasters are essentially limited to one income stream: advertising revenue. Cable television possesses two, subscriber fees and advertising. This gives cable a decided advantage over broadcasters. To regulate broadcasters' only source of revenue would be adding a further burden

to an industry that is already at an obvious disadvantage.

Finally, limitations on commercial programming produce a chilling effect and constitute content-based regulation in violation of the First Amendment. As basic tenets of the First Amendment and recent interpretations illustrate, in the absence of problems with truthfulness in speech, it would appear impossible to regulate the content of commercials without a substantial government interest. As there is no such interest pertaining to the regulation of commercial time limitations, any such regulation would violate the First Amendment.

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The public interest would be disserved by reestablishing limits on the amount of commercial matter that a television station may broadcast. In the United States and across the globe, commercial matter is the vehicle by which valuable information is disseminated. Commercials expose audiences to new ideas, technologies, products and services. Therefore, restrictions on commercialization would be damaging speed bumps on the "Information Superhighway." Limits must not be placed on a medium which plays such a significant role in the daily lives of millions of Americans by satisfying basic informational needs.

The Federal Communications Commission, having previously reviewed commercialization policies in the order pertaining to television deregulation in 1984[1], correctly concluded that marketplace forces, rather than its own rules, could "better determine appropriate commercial levels."[2] Reasoning that audiences tend to avoid excessive advertising, the FCC envisioned a self-regulated media marketplace. Competition, not rules and guidelines, would prevent over-commercialization.

Since elimination of the guidelines for appropriate levels of commercialization in 1984, the media marketplace has grown more competitive. The rise of cable television has contributed to the increased competition, and the future of cable-telco alliances presents enormous potential for fiercer competition in the media marketplace. The amount of commercialization, moreover, has and will continue to respond to consumer demand and audience sensibilities. Regulatory policy should accommodate changes in the media marketplace. If anything, the reasons that were stated in the 1984 Order are even more applicable today.

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[1] Television Deregulation, 98 FCC 2d 1076 (1984).

[2] Id., 98 FCC 2d 1076 at 1102.

I. THE BASIC ASSUMPTIONS OF THE 1984 DEREGULATION ORDER SHOULD BE AFFIRMED.

In 1984, the Commission recognized that the media marketplace was extremely competitive and evolving at a rapid pace. At that time, the Commission also realized that competition within the broadcast community was the best and most efficient method of regulating the amount of commercialization. To stay in business, moreover, broadcasters would have to compete effectively by responding to audience sensibilities.

A key determination in the 1984 Order was that marketplace forces function as a superior regulating mechanism. In so concluding, the Commission pointed out that the level of competition in the marketplace had increased dramatically since the enactment of the guidelines in 1973.[3] The rise in competition between 1973 and 1984 rendered the guidelines unnecessary as a means of policing appropriate commercial levels. With the growth of cable and advent of new service providers, such as telcos and DBS, the media marketplace has become far more competitive than it was in 1984. As a result, the Commission's observations and conclusions in the 1984 Order are even more applicable today.

[3] Id., 98 FCC 2d 1076 at 1102.

In 1984, the Commission was looking to the future. It was noted in the Order that "The significance of our new regulatory scheme lies not only on the impact on the programming behavior of licensees in today's video marketplace, but also in its flexibility in accommodating the natural economic incentives of the developing video marketplace."[4] At that time, cable TV had already become a major player in the media marketplace and the possibility that telephone companies would someday be entering the market had also become evident. Although DBS had not yet entered the picture, the technology existed and the application thereof, although only a dream, definitely had potential in the future.

The players in the market in 1984 created an environment so competitive that the Commission concluded that the competition, not regulation, would be the more effective means of controlling commercial time. This has proven to be correct. Over the eight years since the 1984 Order, the market has regulated itself. A competitor such as DBS service, once only a vision, has launched its satellite. The satellite services plan to sign up a million viewers within eight

[4] Id., 98 FCC 2d 1076 at 1104.

months of the launch.[5] The amount of commercial time that is shown on any given station is strictly regulated by such competition. Each competitor is aware that any advantage in this market is tenuous at best. The market moves so quickly that to fall behind even for a moment could leave one too far back to recover.

The 1984 Order was designed to promote the regulation of commercialization levels via a highly competitive market. The degree and strength of competition directly affects commercialization, and ultimately the survival of broadcasters. For, as competition becomes more vigorous, this self regulating mechanism becomes more efficient and stringent. Marketplace forces will determine the longevity and survival of media participants. The destruction of a participant for failure to respond to marketplace forces is a sufficient incentive for broadcasters to gauge commercial levels. Broadcasters, along with other media service producers, tread no less cautiously when their businesses are at risk than when potentially subject to a government penalty or fine.

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[5] Sean Scully, "Countdown to DBS", Broadcasting and Cable, December 6, 1993, at 30-38. Data as presented by the plans of Hubbard Broadcasting, whose DBS satellite was launched on December 17, 1993.

II. THE PUBLIC INTEREST WOULD NOT BE SERVED BY REESTABLISHING LIMITS ON THE AMOUNT OF COMMERCIAL MATTER THAT A TELEVISION STATION MAY BROADCAST.

The format of commercials and the amount of television advertising reflects consumer demand. Because sensibilities vary over time, the level of commercialization changes accordingly in response to the public interest. As an example, the increased popularity for and consumer demand for increased commercial programming, particularly in the form of home shopping channels and infomercials, exemplifies the evolution that has occurred in audience sensibilities over the past decade. If commercialization and the level thereof did not serve the public interest, it would not be such a powerful, viable medium of attracting viewers in the marketplace.

When the Commission accorded must carry status to home shopping it was stated that, "we find no reason to believe that home shopping stations would survive in an increasingly competitive video marketplace if viewers were dissatisfied with their level of commercialization."[6] The format offered by home shopping and infomercials provides a fresh, innovative means of informing viewers. Through these forms of communication, and those standard spots that

[6] Home Shopping, 8 FCC Rcd 5321 (1993).

air as more conventional commercials, information explaining different products and processes is made available to the public. In a recent decision, the Supreme Court recognized the value of commercial speech. Although in the context of a categorical ban on the distribution of commercial handbills, the Court, per Justice Stevens, stated that any form of "Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[7] Information that previously never would have reached the home is now accessible to and part of the everyday life of each American.

The public interest is a fluid concept. Even the Commission has evolved to address and or meet society's demands and needs. "This has occurred because the understanding of the public interest undoubtedly has evolved along with society. Audience needs and expectations are not the same today as they were in the early days of radio."[8] If a significant number of people find commercials useful and not offensive, false, or overly lengthy, then limits would contravene the public interest.

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[7] Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1510 (1993).

[8] Notice of Inquiry, MM Docket No. 93-254 FCC 93-459 (Released, October 7, 1993) at 3-4, Separate Statement of Chairman James H. Quello.

The Commission has a strong record of allowing the public to determine the definition of public interest. For the public defines its interests by what it chooses or chooses not to view. The format, content and duration of commercials responds to viewers tastes and tolerance levels. If a commercial airs which is offensive, takes up too much time, or serves no purpose, viewers have a great number of options to which they may turn. In today's competitive media marketplace, audiences can easily avoid overcommercialization by switching channels. Channels with excessive commercialization thereby lose viewership and ultimately much needed revenues. Hence, the public interest, as determined by consumer demand and sensibilities, satisfactorily regulates the marketplace. Broadcasters, as well as other media participants, who do not serve the public interest will be destroyed by market competitors. It is economically unsound not to serve the public interest, and the price of insensitivity to audience sensibilities is bankruptcy. A competitive marketplace, reflecting the public interest, not restrictions, effectively controls the amount of commercialization.

III. TO REGULATE ONE SEGMENT OF THE INDUSTRY WOULD UNFAIRLY RESTRICT ONE COMPETITOR AS AGAINST OTHERS.

Broadcasters are essentially limited to one income stream, advertising revenue. On the other hand, cable television, broadcasters' fiercest competitor, possesses two streams of revenue. Whereas broadcasters only have advertising, cable relies on both subscriber fees and advertising to survive in the marketplace This gives cable a decided advantage over broadcasters. To regulate broadcasters' only source of revenue would be adding a further burden to an industry that is already at an obvious disadvantage.

Free off-air television is in jeopardy. The future of television is an uphill battle, fighting cable, telcos and DBS all of the way. As observed by the Commission's staff, "The broadcast television industry has suffered an irreversible, long term decline in audience and revenue shares, which will continue through the current decade."[9] The decline in the percentage of broadcast television viewers takes a great toll on the only revenue source that broadcasters possess, advertising. "[A]dvertising revenues per station in fact have fallen in

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[9] Setzer, Florence, and Levy, Johnathan, "Broadcast Television in a Multichannel Environment," OPP Working Paper Series, No. 26(June, 1991) at 159.

the neighborhood of four percent per year in real terms from 1987 on."[10] If broadcasting does not survive, the only people who will receive the benefits that television has to offer will be those who can afford to purchase special television services.

The imposition of limits on the number of commercials broadcasters can air will create economic inequities and, quite possibly, threaten the financial viability of broadcast television. Already, cable is economically advantaged with two revenue streams. If the Commission limits commercial time on broadcast stations only, a further economic advantage would inure to cable channels and newcomers to the media marketplace as well, i.e., DBS and telcos. Regulating broadcasters' sole source of income restricts their ability to compete with present and future media marketplace players. The disadvantages which already plague broadcasters make it virtually impossible for them to compete now.

Today, broadcasters are tentatively positioned in a volatile, ever-changing market, and are fighting tooth and nail to keep up with technology, new entrants to the market, and existing regulations. As a result, broadcasters

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[10] Setzer, Florence, and Levy, Johnathan, "Broadcast Television in a Multichannel Environment," OPP Working Paper Series, No. 26 (June, 1991), 6 FCC Rcd. 3996 (1991).

must have the freedom to vary and allocate commercial time so that they may achieve economic efficiencies. To implement a rule that effectively curtails this freedom holds no positive or redeeming features. In fact, regulating one segment of the media marketplace will add another burden on broadcasters, and deal a powerful blow to our society's most powerful and only free means of keeping abreast of new ideas, technologies, products, and services.

Regulating the broadcaster's only revenue stream restricts their ability to compete with any of the other players who are either competing now or will be in the very near future. Disadvantages already plague broadcasters, making it increasingly difficult for them to compete. To add any further burden to them would be devastating to our society's only free means of keeping up with all that goes on in the world.

IV. LIMITATIONS ON COMMERCIAL PROGRAMMING PRODUCE A CHILLING EFFECT AND CONSTITUTE CONTENT BASED REGULATION IN VIOLATION OF THE FIRST AMENDMENT.

Placing limitations on broadcast programming would violate the First Amendment. The type of restriction that commercial limitations would place on broadcasters presents a plethora of problems in this arena. Whether there is a

"fit" between the intent of the regulation and its impact, the distinction between commercial and non-commercial speech, and the implications of content based regulation are three serious concerns presented by the imposition of commercialization restrictions on broadcasters.

In order for honest, non-deceitful speech to be restricted, legislation must satisfy a two prong test. First, legislation must be narrowly tailored to directly advance a substantial government interest. Secondly, there must be a reasonable fit between the desired result and the legislation.[11] Thus, in order for rules limiting commercial time to successfully survive scrutiny under the First Amendment, all of the above criteria would have to be satisfied.

Finding a justification for limiting the amount of commercial time that is broadcast would be a nearly impossible task. Commercial speech holds a valuable place in society. In the absence of problems with the truthfulness of the speech, finding a substantial government interest is problematic at best. As for narrow tailoring, how does one narrowly tailor limitations on commercial time? Placing arbitrary time limits or limiting time periods in some other random fashion is in no way narrow. In order to pass First Amendment scrutiny, the

[11] Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989).

narrow tailoring must be extremely precise. The reasonable fit test set forth in Trustees of State University of New York v.Fox,[12] makes it clear that to place restrictions on commercial speech, there would have to not only be a substantial government interest, but also rules that fit this interest in a very precise manner.

As commercial speech, television commercials are entitled to the same protection as other forms of speech. "It is clear, for example, that speech does not lose its First Amendment protection because money is spent to protect it, as in a paid advertisement of one form or another."[13]

To regulate commercial time that is broadcast on television would be stating that it is deserving of a lesser protection than that of other forms of speech that are protected. Absent some content problem, such as falsity or deceitfulness, such a distinction would require the Commission to meet a very stringent burden as seen in the holding in Discovery.

To place commercial time limits on broadcasters only constitutes uneven administration of the First Amendment and vitiates established First Amendment principles. No First Amendment basis for such restrictions on commercial

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[12] Trustees of State University of New York v. Fox, 492 U.S. 469 at 480.

[13] Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993).

speech exists, nor is there a legitimate justification for discriminating against one segment of the media industry. Imposing commercial time limits on broadcasters will not only muster scrutiny from the courts, but will also saddle the government with a burden that it cannot meet.

V. CONCLUSION.

INTV opposes reimposition of commercial time restrictions on broadcast television. The Commission ought stand by the sound conclusions that were enunciated in its 1984 Order. Restricting the amount of commercial time allowed on broadcasting channels would have devastating and lasting effects not only on broadcasters, but also on the millions of Americans who rely on this form of speech each and every day.

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